United States Supreme Court

No. 239.

JAMES BROWN, ET AL.
APPELLANTS,

VS.

ENOCH PIPER
APPELLEE.

Brief for Appellants

GEO. GIFFORD,
EDWARD AVERY, } *For Appellants.*

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United States Supreme Court.

JAMES BROWN ET AL.
Appellants.
—*vs.*—
ENOCH PIPER,
Appellee.

No. 239.

This is an appeal from a decree of the Circuit Court of the First Circuit, District of Massachusetts, in a suit in equity.

The suit was brought for an alleged infringement of two letters-patent; one No. 732, and the other No. 36,107. Only No. 732 is relied upon. This is for a process consisting of preserving articles in a close apartment by means of a freezing mixture not in contact with the atmosphere of the preserving apartment.

The patent is printed at pages 74, 75 and 76 of the Record.

The bill was in the usual form in such cases, and was filed January 4, 1868.

The answer denied the novelty of the alleged invention.

The case was heard on pleadings and proofs, and decided October 25, 1870.

The opinion of the Court is printed in the Record at page 566.

A decree pursuant to this opinion was entered November 10, 1870, referring the case to a Master to take an account of profits. This decree is printed in the Record at page 10.

The Master proceeded to take an account, and submitted to the respective counsel a draft report.

The counsel for the Appellants then addressed to the Master a petition for leave to introduce further evidence, which petition is printed at page 27 of the Record.

The counsel for the Appellants filed objections to the draft report, which are printed at pages 27 to 29 of the Record; he also filed requests for specific findings, as per Schedule K, page 29 of the Record.

The Master filed, February 7, 1872, a report, of which a draft had been submitted to respective counsel, and also at the same time an additional report, in which additional report the Master refused to admit further testimony, as prayed for in the petition of Appellants' counsel, alleging as a reason that, as matter of law, it was not competent for him to hear further evidence or grant the petition. This additional report is printed at page 24 of the Record, and the refusal of the Master at page 24, folio 40.

The counsel for Appellants filed exceptions March 30, 1872, to the Master's report, which are printed at page 72.

The case was heard on exceptions to the Master's report, and decided February 10, 1873.

The opinion of the Court delivered thereon is printed in the Record at page 571, and the decree entered pursuant thereto overruling the exceptions and confirming the Master's report, is printed at page 73 of the Record.

ASSIGNMENT OF ERRORS.

The Court below erred—

I. In deciding that the use by Charles F. Pike and Otis P. Underwood of the patented process was only an abandoned experiment, and not sufficient to invalidate the Piper patent.

II. In deciding that the process described in the English patent to Benjamin & Grafton, enrolled July 27, 1842, differs from that patented by the Appellee, and in deciding that in the Benjamin & Grafton patent there is no description that the freezing mixture contained in the vessels in the preserving chamber is to be kept free from contact with the atmosphere of the chamber itself.

III. In deciding that Gardiner T. Swartz did not use the patented process prior to the time of the invention of it by the Appellee.

IV. In not deciding that Joseph H. Racey, Jr., had the patented process in use in Centre Market, in the City of New York, in 1856, 1857, 1858.

V. In deciding that a use by Joseph H. Racey, Jr., in the latter part of 1859 would be more than a year after the Appellee's invention.

VI. In holding that to ante-date the invention of the Appellee it was necessary for the prior use to have been such as to freeze the article in the preserving chamber, or such as to reduce the temperature in the preserving chamber below the freezing point of water.

VII. In deciding that the patent granted to Appellee, dated March 19, 1861, is a good and valid patent, and that the Appellee had a right to recover from the Appellants for the use of the alleged invention, and in referring the case to a Master to take an account, and in granting an injunction restraining the Appellants from using the alleged invention.

VIII. In overruling the Appellants' exceptions taken to the Master's report.

POINTS.

I.

Construction of the Patent.

The first question in order is, what is the scope of Appellee's patent? To determine what is patented, particular attention must be given to two parts of the specification of the patent; the first is where the inventor announces to the public what invention he has made, and defines its nature; the second is the claim in which he sums up by again defining what he intends to patent.

In Appellee's patent in this case those two controlling parts of the specification exactly agree with each other.

In the statement by the patentee of the nature of his invention, he says:—

> "The nature of my invention consists in a method of *preserving fish and other articles* by placing them within a chamber and cooling the latter by means of a freezing mixture, so applied that no communication shall exist between the interior of the preserving chamber and that of the vessels in which the freezing mixture is placed."

He, for the purpose of further defining his alleged invention, and having it seen in contrast with what he assumed was the old method, states what he understood to be the only old method, thus:—

> "Hitherto the only method in use for preserving this kind of fish in a fresh state, has been to pack them with crushed ice in barrels or boxes. This method, however, owing to the melting of the ice and the consequent moistening of the fish, fails to preserve them fresh and good for more than a month at most; whereas, by my new method and treatment they can be kept as fresh and sweet as when first caught, and for any desirable length of time, even for years."

He then, in conclusion, ignores all limitation to any particular *kind* of apparatus, and all limitation to preliminary freezing or coating, and asserts his claim in absolute and unequivocal terms, thus:—

> "Preserving fish or other articles in a close chamber by means of a freezing mixture having no contact with the atmosphere of the preserving chamber, substantially as set forth."

The patent is for preserving an article in an apartment cooled by a freezing mixture not in contact with the atmosphere of that apartment. The article need not be frozen to be within the patent. The preliminary freezing, which the patentee states his patent is not to be limited to, is the only freezing provided for by the patent. Therefore, as the patent is not limited to that preliminary freezing, it is not limited to any freezing, but is a patent for merely *preserving* an article whether frozen or not, and this exactly agrees with what the patentee states the nature of his invention is, and with what he claims, and this is the only view which can be taken consistently with that statement or that claim. The specification says, "The fish are then packed closely together in a large preserving box;" but it does not say they are to be packed in a frozen state; besides, as this preliminary freezing may, according to the patent, be dispensed with, this being done they would not be frozen when packed in the preserving chamber. The patent has no more to do with freezing than it would have had if the word freeze or frozen had not been used in the specification at all. The patent no more requires the article to be treated to be frozen than it does for it to be cooked.

II.

The thing patented.

It is plain and certain—

1st. That the thing patented is a *process.*

2d. That it is not limited to any particular *kind* of apparatus, but includes the doing of the thing by any kind of apparatus in which the air of the preserving chamber is excluded from the freezing mixture.

The patent twice distinctly disclaims any limitation to the kind of apparatus described [folios 129 and 130 of the Record]. The patentee first says, the apparatus "may be constructed in various ways and of different shapes;" and then, after describing an apparatus, adds, "I do not desire to be understood as confining myself to the use of the specific apparatus above described."

3d. That the process patented consists of the *act* of "*preserving* fish or *other articles* in a close chamber, by means of a freezing mixture having no contact with the atmosphere of the preserving chamber."

Such is the invention patented. The addition to the claim of the words "substantially as set forth" does not restrict or modify the claim beyond what is above stated, because, on referring to the description, nothing is found which limits the scope of the claim beyond what is above stated.

The specification explains that the method "substantially as set forth" consists of placing the article to be preserved "within a chamber and cooling" it "by means of a freezing mixture so applied that no communication shall exist between the interior of the preserving chamber and the freezing mixture." That is the way substantially set forth.

The process patented includes the *doing* of the thing by the use of any kind of apparatus in which the article to be treated is in a close vessel, the atmosphere of which is not in contact with the freezing mixture. If the article to be preserved is in a close vessel, the operation is equally within the patent, whether the freezing mixture is piled up on such close vessel, or is in another vessel and surrounds the close vessel, or is enclosed in a vessel placed within the preserving chamber. Whenever an article is preserved in a close vessel by the use of a freezing mixture, which freezing mixture is not in contact with the air contained in the close vessel, the patented process is practiced. If the article to be treated be enclosed in a vessel, and the freezing mixture be enclosed in another vessel, and this latter vessel be placed in the former one, and the article be thus frozen or preserved, the patented process is used; also, if a freezing mixture be placed in a vessel either open or enclosed, and the article to be treated be enclosed in another vessel, and this latter vessel be placed within the former, and the article be thus treated or preserved, the patented process is used. So, too, if a fish or other article to be treated be enclosed in a vessel setting on the floor, and the freezing mixture be piled up around the vessel, and the fish or other article to be treated be thus frozen or preserved, it would be using the patented process.

Such is plainly the scope of the patent, and such is the construction given it by Judge Shepley, who decided this case in the Court below. Judge Shepley, in his opinion, says:—

> "The complainant's bill claims as his invention an 'Improvement in the method of preserving fish and other articles.' The method claimed is described as '*A method of preserving fish or other articles*, by placing them within a chamber and

> cooling the latter by means of a freezing mixture, so applied that no communication shall exist between the interior of the preserving chamber and that of the vessel in which the freezing mixture is placed.' The patent describes it as 'A new and useful method of preserving fish.' The claim in the patent is 'Preserving fish or other articles in a close chamber by means of a freezing mixture, having no contact with the atmosphere of the preserving chamber substantially as set forth.'"

This construction of the patent by the learned Judge is correct. His error was in not making a correct application of the facts proved to the patent so construed. In considering the prior inventions, he seems to have lost sight of the fact that the process patented is for preserving the article whether frozen or not frozen.

Now let us see what essentials this patented process is composed of.

1st. There must be an article to preserve.

2d. It must be in a close chamber.

3d. There must be a freezing mixture.

4th. The *freezing mixture* must have substantially no contact with the atmosphere of the chamber in which the article to be preserved is placed.

5th. The article in the preserving chamber must by these means be preserved.

Wherever and whenever these five things are found together the patented process is employed. If the five things be present no one need look further for the patented process.

The process patented being composed of the five elements or parts above enumerated, it follows that wherever these elements are found in combination, there the patented process will be found, whether it be in an alleged infringement or in a prior use. There must be an *article* to be operated upon, a *place* for that article, a *condition* of that place, an *agency* to extract caloric from that place, a *certain relation* between the article to be preserved and the agency for extracting the heat, and a *preservation* of the article. Wherever those parts and conditions exist, there is the patented invention. If they were in existence together prior to the time of the alleged invention of Mr. Piper, then his patent, like many others from similar causes, is invalid.

See Piper v Moore, 10 Blatch. C.C.R. 264

III.

What the patent is not limited to.

1st. It is certainly immaterial to the patent as to what shall be the size of the preserving chamber, or of what material it shall be composed, or how thick or thin its sides shall be. The patent has no limitation to anything of that kind.

2d. It is not limited to any *kind of apparatus*, except that the preserving chamber must be "close" and in such relation to the freezing mixture receptacle (which need not be close) that the latter can extract caloric from the former.

3d. It is not limited to any *kind of article* to be preserved; it includes the preservation of ice as fully as it does of fish.

4th. It is not limited to any particular *length of time* of preserving it.

5th. It is not limited to any particular *temperature*.

6th. It is not limited to treating a single kind of article at one time. It includes preserving any number of kinds of articles at the same time, and one of them may be ice.

7th. It is not limited to freezing articles or preserving them in a frozen state, but covers the *preserving* of them by the means described, whether frozen or not.

The patent nowhere says that the article to be preserved must be frozen, nor does it describe conditions of the operation from which, of necessity, the article to be preserved must be frozen. It first states that the nature of the " invention consists in a method of preserving fish and other articles by placing them within a chamber and cooling the latter by means of a freezing mixture." It does not say to what degree it is to be cooled. Then, after describing apparatus, it adds, " the temperature of the preserving chamber can be maintained for any length of time below the freezing point, and fish surrounded by this dry and freezing atmosphere will be preserved," etc. This is a statement only of what *can*, not of what *must* be done. It is not given as a limitation of the process patented to a temperature below or at the freezing point. It simply states what was well known, that is, that by the use of a freezing mixture you can cool the air in the interior of a vessel down to below the freezing point. Cooling the interior of the preserving chamber down to 34 degrees and preserving an article in it would be as much an infringement of the patent as cooling it down to 30 degrees.

Preserving fruit by such means and in such apparatus would be within the patent. Refrigerator railroad cars, which are extensively used for the transportation and preservation of fruit, have the interior of their preserving apartments cooled by freezing mixtures, but, of course, not cooled down to below the *freezing* point.

The learned Judge in stating the claim, said the claim was—

> "For the method of preserving fish or other articles in a close chamber, by means of a freezing mixture having no contact with the atmosphere of the preserving chamber."

What, now, is the evidence is this case of prior uses of the process patented by Piper?

IV.

The invention and use of the patented process by Charles F. Pike constitute a full and complete defence against the Piper patent.

The law announced several times by this Court, and once as recently as at the last term, applied to the facts fully proved and expressly found by the Court below, independently of any other defence, entirely invalidates the patent.

The law referred to as announced at the last term is in Coffin *vs.* Ogden, 18 Wallace, 120. The facts proved and found by the Court are the completion of an apparatus suitable to work the process, and an actual practice of the process itself by Pike and Underwood prior to the invention by Piper.

Charles F. Pike caused an apparatus to be constructed in Providence, R. I., in the fall of 1855 or spring of 1856, for freezing animal substances, which contained a metallic vessel for a freezing mixture and a preserving chamber, the interior of the freezing mixture vessel not communicating with the atmosphere of the preserving chamber. This apparatus is described by Mr. Pike [page 529, ans. 8], and by Otis P. Underwood, who helped to construct it:—"It was a full-sized practical apparatus" [page 517, ans. 8].

This apparatus was used for freezing a variety of articles, such as meats, fruit and fish [page 516, ans. 7, and page 530, the latter part of ans. 8]. The freezing mixture used was ice and salt, and when in operation for freezing there was no contact between the freezing mixture and the atmosphere of the preserving chamber [page 516, ans. 8 and 10, and page 530, latter part of ans. 8]. The articles were put into the chamber in an unfrozen state and taken out thoroughly frozen [page 518, ans. 23, 24, 25 and 26]. This apparatus was completed ready for practical use without anything more being done to it. The process of freezing articles in it by the use of it was successfully performed, and needed nothing added to or taken from it to adapt it to general use. Further uses of it to any practical extent would have been simply repetitions of the use which was made of it. The invention, therefore, was not only completed ready for use, but it was actually and successfully used. This, according to the law applied by this Court in the case of Coffin *vs.*

refer to
5 following
answers
same page

Ogden, was going further than was necessary to invalidate the Piper patent. In that case this Court says:—

> "The invention or discovery relied upon as a defence must have been complete and capable of producing the result sought to be accomplished, and this must be shown by the Defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him. If the thing were embryotic or inchoate; if it rested in speculation or experiment; if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed, while in the other case was only progress, however near that progress may have approximated to the end in view. The law requires not conjecture, but certainty. If the question relate to a machine, the conception must have been clothed in substantial forms, which demonstrate at once its practical efficacy and utility. The prior knowledge and use by a single person is sufficient. The number is immaterial."

Pike's invention was not embryotic or inchoate; it did not rest in speculation; the operation pursued for its development did not fail to reach the point of consummation. His invention was not only completed, capable of producing the result sought, but it was actually used and produced that result, and this to the satisfaction of the Court below.

The learned Judge in the Court below admits and says that the Pike apparatus was completed, and that the process was practiced. He says, in his opinion [page 570], "the

Plaintiff's process was once practiced," but holds that it was only an experiment, and was abandoned. This is an admission that the invention was completed, and had a practical existence. This is all which this Court in the case cited required. What was done by Pike and Underwood was not an experiment made in pursuit of a thing and abandoned before attaining it; if an experiment, it was only an experiment in reducing the thing to practice, illustrating its completion and proving it successful. This having been done, the invention was complete, and its completion was shown in the most satisfactory manner, which was by reducing it to practice. An abandonment by the inventor in such case is not an abandonment to an individual, but an abandonment to the public. Pike had the invention, and if he abandoned it, he abandoned it not to Piper, but to the public.

It is respectfully submitted that the invention of Pike as proved, and as found by the Court below, is sufficient to invalidate the Piper patent, and that the Court will have no occasion to look further into the case.

To the same effect are Parker v Ferguson, 1 Blatc
Whitely v Swayne, 7 Wall.
Agawam Co. v Jordan, 7 Wall

V.

The English patent to Benjamin & Grafton, [pages 557 and 558,] contained a sufficient description of the process patented by Appellee, to ante-date his patent.

That patent was for preserving animal and vegetable matters, by freezing or cooling them by the aid of freezing mixtures, and the invention, as stated in the specification, was "particularly applicable to preserving fish."

The specification provides—

First.—For a preliminary freezing of the fish, by the use of a freezing mixture.

Second.—For preserving them in a frozen state, by a continued application of the freezing mixture in the same way it was applied to freeze them.

Third.—Preserving them in a frozen state in a close chamber or apartment, the atmosphere of which was cooled by a freezing mixture.

The preliminary freezing was done by putting the fish in a metallic vessel, filling it with water, and depositing it in a mixture of pulverized ice and salt. When the fish were to be preserved in a frozen state in a close chamber, the fish, after being frozen, were put into the chamber in baskets, or on slabs, and the atmosphere of the close chamber was cooled by coming in contact with the surfaces of metallic vessels containing freezing mixtures. The cooling was facilitated by agitating the atmosphere within the chamber by means of revolving fans, or other suitable means, within the chamber, causing it thereby to be brought more than it otherwise would, in contact with the surfaces of the freezing mixture vessels, so that the moisture taken up by the air would become frozen on the surfaces of the freezing mixture vessels.

The specification states that by the means described, "the fish will be kept cool and preserved, and if it has been previously frozen, as before described, the keeping it in a room or chamber, as here described, would retain it in a frozen state."

The Court below, disposed of this English patent by holding that "there is no description that the freezing mixture contained in the vessels in the preserving chamber, is to be kept free from contact with the atmosphere of the chamber itself" [page 570].

It is true the specification does not in terms directly state that there is to be no contact between the freezing mixture and the atmosphere of the preserving chamber, but the implication that such was the case is quite as strong as the statement to that effect would have been. The object of the patentees in bringing the air in contact with the metallic surface of the vessels within the chamber containing the freezing mixtures was to remove moisture from the air by causing it to be frozen on those surfaces.

The liquefaction of the ice and salt furnishes vapor to the atmosphere which is in contact with the ice and salt. To have left the freezing mixture in contact with the atmosphere of the chamber would obviously have been the most effectual way of defeating the object in view. No man of common sense, having in view freeing the air from moisture, would attempt to do it by means adapted to supply it with moisture.

The specification of the patent is addressed to at least common sense, and to attempt to free the atmosphere of an apartment from moisture, and at the same time to open a pool of water in contact with it, would not be in accordance with, but contrary to, the exercise of common judgment.

If a specification were describing a means of drying an article, it would not be necessary for it to say that, during the operation, no water must be poured on the article, nor is it necessary, when a specification is describing a means of freeing the air of an apartment from vapor, for it to state that no means should be at the same time employed for supplying it with vapor.

VI.

Gardiner T. Swartz, in his use of the Good apparatus for preserving dead bodies, practiced the process patented by Appellee.

He states that he used the Good apparatus for freezing bodies, and, as nearly as he could remember, twenty years before the time of his examination [page 511, q. 4, 5], and that his freezing mixture was ice and salt [q. 6].

One of the ways in which he used the Good apparatus for freezing the bodies of children was to have them supported in the chamber sufficiently high to bring them nearly up to the pan containing the freezing mixture, and there being no contact between the freezing mixture and the atmosphere of the chamber. This was one of the several ways in which he used the apparatus "ever since" he first bought it, which is, as nearly as he recollects, in 1847 [page 512, Q. 12, 13 and 14, and page 513, X-Q. 1].

The Court below admitted that the Good apparatus was capable of working the patented process [page 569, fol. 958], but disposes of the testimony of Swartz by stating [page 570] that the witness is "indefinite as to date, and leaves it uncertain whether he ever produced the atmosphere in the chamber below the freezing point of water. This object was not to freeze the body so as to preserve it for any length of time, but only by partially freezing the surface to arrest the progress of decomposition."

It is understood that the indefiniteness of date referred to by the learned Judge relates to the date of *freezing* the body, and not to the date of *preserving* it unfrozen.

It is respectfully submitted that, under a proper construction of Appellee's patent, it is entirely immaterial whether Swartz produced a temperature of the atmosphere in the chamber below the freezing point of water, or whether the body was frozen therein little or much, or none at all, so long as it was preserved therein, as Swartz said he did it, with no contact between the atmosphere of the chamber and the freezing mixture which was in the pan isolated from that atmosphere.

The disposition which the learned Judge made of the testimony of the witness Swartz was obviously caused by his erroneously assuming that, to bring his practice within the Appellee's patent, the body must have been frozen.

VII.

Joseph H. Racey, Jr., used the process patented by Appellee during the years 1856, 1857 and 1858.

The testimony of Racey's use in the years 1856, 1857 and 1858 seems to have been entirely ignored by the learned Judge of the Court below. For what reason does not very clearly appear; but it is believed that it was because the testimony shows that in Racey's use of his apparatus during those years he put ice in the box with the fish, and that the Court assumed that the preservation of the fish in the presence of ice in the same chamber with the fish was not practicing Appellee's patented process.

It is respectfully submitted that such an assumption is erroneous, and that preserving fish in the presence of ice in the preserving chamber is as fully within the Appellee's patent as preserving fish without the presence of ice. It would be strange indeed if, while one were infringing Appellee's patent by preserving fish in a frozen or unfrozen state in an apartment cooled by a freezing mixture not in contact with the atmosphere of the apartment without any ice in it, the infringement would be avoided by putting a lump of ice in the apartment with the fish. Even Appellee's expert, Henry B. Renwick [page 91, cross-question 43], was compelled to admit that, having ice in the preserving apartment with the fish, and reducing the temperature below the freezing point of water, would be an infringement of Appellee's patent, and, therefore, if practiced prior to Appellee's invention, would ante-date and invalidate his patent.

During those years Racey had in use an apparatus in Centre Market consisting of a large box with a zinc pan in the top of it, in which zinc pan was a freezing mixture, and in the box fish were preserved by the cooling agency of the freezing mixture, the freezing mixture having no contact with the atmosphere of the box.

An end view of this box is represented on page 90 of the Record.

Joseph H. Racey, Jr, for many years a fish dealer in the city of New York, testifies to such use of that apparatus [page 309], thus:—

Q. 3. When did you first attempt to freeze fish artificially?

A. In 1856 and 1857.

Q. 4. Where?

A. In Centre Market.

Q. 5. Will you please state what you then did?

A. I froze Spanish mackerel—the first fish I ever froze. Spanish mackerel run from one and a half pounds to four pounds; some weigh as high as seven pounds, but the general run is about three and a half pounds.

Q. 6. Will you please state the manner in which you first froze Spanish mackerel, as stated in your last answer?

A. The box I built first to keep lobsters; at that time I used to sell from 500 pounds to 1,500 pounds of lobsters on a Saturday, and in order to keep the water off the lobsters, I placed a pan on the top of the box; the inside measurement of the box was seven feet long, seven feet high, and five or six feet wide; I erected a zinc pan inside the box, on the top part, and making a shoulder so as to nail it, and made the pan slanting from the top, and went down in the centre on to the rear of the box; there was a joist on the top, in front of the pan, to hold it up; I have a model of the box which I will put in as an exhibit.

I put a layer of ice in first, and then a layer of Spanish mackerel, and so on until I got it up nearly to the pan, with ice ground by a machine; in the morning when I came there, the mackerel nearest the pipes and pan were most frozen. In the top pan I put salt and ice—ground ice and salt, mixed. In 1857, I tried it on one salmon; on the 29th day of April or June, 1857, I shipped the salmon to General Sickles, at Washington; the salmon was not frozen in the style we freeze them now; the salmon was very hard, but would give; it was frozen to a certain extent. I continued the same process for three years, 1856, 1857 and 1858. I sold some of the mackerel to W. M. Rogers & Co., Fulton Market; I sold some to Moon, Lamphier & Co., of Fulton Market; those mackerel which I sold to Moon, I bought for eight cents or ten cents per pound, and sold them back for forty cents or forty-five cents. Each morning I took out mackerel, the top layer was most frozen—the top parts of the fish; all mackerel which were bare was frozen; the portions which touched the ice were not frozen, that which was above, was. I also sold some to Mr. John Hawkes, Washington Market; Mr. Penniman also bought some, as did also Judge Hitchcock; that is all I wholesaled, I can think of, and these I sold at from forty cents to fifty cents per pound; I retailed a great many at one dollar per pound. I have frozen other fish, such as king-fish and Lafayette; I also froze soft shell crabs there, and did not think it would kill them; I put them in alive, and found them all dead and stiff in the morning; during the season, I have frozen shad, and almost all that kind of fish, in the same way as the mackerel. By using the salt, with ice in the pan, I found the ice in the box did not melt so soon.

Q. 7. If you have not examined the exhibit since produced by you, will you now proceed to describe the internal arrangement of the box in which you froze fish as above described?

A. I have not examined the exhibit since it was produced. To the best of my recollection, the box was of the size previously mentioned. The box inside was furnished with a pan similar to the one now before you, with the exception of a flange coming out on the under side, and a joist crossways under the front of the pan, and from that pan there were two pipes running down the sides of the box from the pan through the box bottom. The two pipes leading from the pan were in the corners at the back of the box, from the bottom of the pan.

Q. 8. How were the lids or openings to the box and pan arranged?

A. There was one lid dropped down from the front, and another lid on the top about the same size as the one in front; the edge of the pan was projecting half way under the top lid; the box was made of two inch lumber, all through clear plank; there was no double wall. I used to put a blanket on the top and front of box, under the lids, so as to fit them tight.

Q. 9. When the pan was filled with ice and salt, and the lids closed, was there any contact between the air in the preserving chamber, and the ice and salt in the pan?

A. No, sir. That is why I used the blanket to make it fit tight all over.

Q. 9*a*. Refer to the Exhibit No. 2, and state in what, if any, particulars it differs from the original internal construction of the box used by you.

[Exhibit handed witness.]

A. The edges of the pan were turned over the top parts of the side walls and nailed on so as to form a flange. There was a joist bevelled off so as to fit under the mouth of the pan; the joist rested on two pieces of two-inch stuff nailed to the sides; the edge of the pan was fastened with copper tacks to the joist.

Q. 10. Were there any openings in the pipes except at the top and bottom?

A. No, sir.

Q. 11. When the pan was filled with salt and ice did you observe any peculiar collection on the pan or pipes? If so, what?

A. I found the pipes where they did not touch the ice were coated with frost, as also the pan on the inside of the chamber. The greatest was on the pipes at about one to two feet from the pan.

Q. 12. According to the best of your present recollection, when did you first freeze fish in that apparatus?

A. In the latter end of 1856.

He testifies [page 310, question 6, and page 321, cross-question 163], that he sold some of the mackerel which he had preserved in said apparatus to W. M. Rogers & Co., of Fulton Market, not, however, in a frozen state, as his custom was to thaw them out in ice water before cleaning them for delivery [page 320, cross-question 154].

In corroboration of these statements of Racey is the testimony of W. H. Middleton, who was the bookkeeper of W. M. Rogers & Co., [pages 488 and 489] who there explains a settlement which was made between J. H. Racey, Jr., and W. M. Rogers & Co., in October, 1858, from which it appears that there was a running account between W. M. Rogers & Co. and Joseph H. Racey, Jr., from January 23, 1856, to the 5th day of October, 1858, the date of settlement, in which account W. M. Rogers & Co. had charged to Racey $54 99, and Racey had charged to that firm $71 29. On the back of the bill which had been rendered to Racey by W. M. Rogers & Co. was entered a memorandum of two items; one of bass under date March 13, 1857, and another of mackerel, under date September 27, 1858. It should be remembered that W. M. Rogers & Co. were the predecessors of Middleton, Carman & Co. [page 105, questions 67 and 68], and "the largest retail dealers in New York, or in the United States, in fresh fish" [page 105, question 72], doing business therein at the rate of $75,000 to $100,000 per annum [page 106, question 75].

It is obvious that there must have been some special reason why such a concern as W. M. Rogers & Co. purchased fish of Racey, who was a small retail dealer. The reason of this doubtless was what Racey swears to, that he had preserved fish, and could furnish them out of the season for fresh fish.

JOHN W. DANFORD was the carpenter whose firm constructed the box for Racey, which Racey describes. He testifies thus [page 341]:—

> Q. 4. Has your firm done work for Mr. Joseph H. Racey, Jr.?
> A. Yes.
>
> Q. 5. Do you remember, in 1855 or 1856, building for Mr. Racey an ice-box which was placed in the Centre Market?
> A. We made one for him about that time.
>
> Q. 6. Have you any recollection of the size and shape of that box?
> A. It was a high box, not very deep from front to back; it might have been four feet, and I should say about six feet high at the least; I don't know but it was higher than it was long.
>
> Q. 7. How was it entered? What doors or openings had it?
> A. It strikes me that there was one door which opened from the top, and another door, I am pretty sure, opened from the end of it to go right into it.

WM. H. RACEY, the brother of Joseph H. Racey, Jr., who was connected with him in business in 1856, and afterwards in Centre Market, testifies thus [page 362]:—

> Q. 6. During the time that you were there prior to 1859, were you aware of his having and using an ice box fitted with pan and pipes?

A. I was.

Q. 7. Please describe the arrangement of the pan and pipes, as nearly as you can?

A. It was a nearly square box, with a lid opening half way across the top, and another lid let down half way in front, fitted on the inside with a metal reaching somewhat more than half way across the top from the back, the bottom of the pan slanting backwards; there were two drain pipes leading from the pan, (placed in the back corners of the box,) leading downwards, and passing through the bottom of the box, to carry off waste water.

Q. 8. When first do you remember to have seen that box?

A. In the Fall of 1856.

Q. 9. Did you ever know any fish or other animal substances put into that box? If so, what condition were they in when placed there, and what when taken out?

A. Yes; they were in a natural state when placed in the box, and when taken out some were frozen, and some partly frozen.

Q. 10. What, if anything, was placed or kept in the pan at the top of the box?

A. Ground ice and salt.

Q. 11. Do you know how long that box was continued to be used by Mr. Racey?

A. I can't tell how long it was used.

Q. 12. When did you cease your connection with Mr. Racey and the business in Centre Market?

A. In April, 1861.

And on page 363, thus:—

X-Q. 24. The fish that were put into the ice box were put in in layers, alternately with layers of ice?

A. Yes.

X-Q. 25. You say you don't know how long that box was continued to be used by Mr. Racey; (in the manner described, I mean, of course:) do you know whether it was one year, two years, or three years?

A. I am unable to state positive how many years.

X-Q. 28. Can you name any one to whom fish which had been kept in that ice box was sold?

A. To his customers at that time; I forget their names; the fish were not sold in a frozen state; but had to be thawed in order to be cleaned, consequently the customers did not know they had been frozen.

Charles Haggerty, a witness not interested in the case nor in the fish business, proves in the most positive manner that an ice box was in J. H. Racey Jr.'s cellar prior to the time of the construction of the freezer in 1859, and which corresponded in size with the one stated to be there by Joseph H. Racey, Jr., John W. Danford and William H. Racey; saw fish and ice put into it in layers such as the other witnesses state was done. He testifies thus [page 336, 337]:—

X-Q. 63. Were you ever in the cellar of Mr. Racey, in Centre Market, cellar No. 11, before the time when you went with Councilman Burns to see the freezing apparatus?

A. Yes, sir; I was in the cellar occupied by Mr. Racey.

X-Q. 64. How frequently do you think you were in that cellar during the years 1856, 1857, 1858?

A. Three times or more.

X-Q. 65. State as nearly as you can how many times you were in that cellar before the time when you were there with Councilman Burns, and saw the freezing apparatus which you have described?

A. I was in there five or six times; I was in there while it was being built.

X-Q. 66. What did you ever see in that cellar before you saw the freezing apparatus there which you have described?

A. Brooms, baskets, ice-box, boxes, and such things as that.

X-Q. 67. It was a place for stowing or keeping various kinds of articles, was it not?

A. Yes; such as butchers or fishermen would use.

X-Q. 68. What do you mean by an ice-box? A refrigerator?

A. A box to keep ice in; I have seen fish put in it.

X-Q. 69. Do you mean that it was a box in which ice was placed to keep to be taken out as wanted?

A. No.

X-Q. 70. Then state what you do mean and describe the box fully.

A. The box, I should say, was six or eight feet long, from three to four feet wide, five feet or over high, with the ice broke up small, and to preserve the fish there were layers of ice and layers of fish, and then ice put on top of it again.

X-Q. 71. Do you mean that you ever saw layers of fish and layers of ice together in the manner you have described in that ice-box?

A. I have seen them put in in the manner described.

X-Q. 72. This was before you were there with Councilman Burns?

A. Yes, sir.

X-Q. 73. Did you see this ice-box used in this way repeatedly before that time?

A. I have seen it twice or more.

X-Q. 74. What else was there about that ice-box which you can describe? I speak of its internal construction. Had it any doors, or any racks, or any drain-hole at the bottom, or anything else?

A. It had a door raised up from the top; all I saw was the outside; I did not examine the box; I only saw the ice and fish put in.

X-Q. 75. Did you see them raise up that door and put in the fish and ice and shut the place up again?

A. Yes.

X-Q. 76. This door was a lid, if I understand you, which was lifted up from the top of the box?

A. Yes.

The testimony of one of Appellee's own witnesses, Matthew J. Tuomey is conclusive that a box bearing the description of the one Racey had constructed in 1856 was in the cellar which he occupied. The box constructed in 1856 had a door opening downwards. [Joseph H. Racey, Jr., page 310, question 8.]

Mr. Tuomey, at pages 151, 152 and 153, testifies thus:—

Q. 3. Were you ever clerk of that market? If yea, from what time to what time?

A. I was appointed clerk in the year 1858, about the middle of September or the first of October; I continued from that time till about the latter part of January or the middle of February, 1862.

Q. 8. Who else, if any one, made use of the cellar while you were clerk.

A. Mr. Racey—J. H.

Q. 10. While you were clerk of the market state what articles of property you saw in that cellar.

A. I saw barrels, brooms, oysters, and rails used for to hang meat on, belonging to myself, and an ice box belonging to Mr. Racey. Among other things there was a machine belonging to Mr. Racey that he had to grind ice with.

Q. 11. Where was the ice box you speak of located in that cellar?

A. It was on the south side of the cellar, fronting on Centre street, right inside of the entrance to the cellar; it was to the right hand of the door as you enter, about eighteen inches or two feet from the side of the door as you go in. It backed up against the wall on the south side.

Q. 13. Describe this box as to size.

A. It was a box in the neighborhood of five feet high, about four feet or four and a half feet wide, and about six to eight feet long, with a door that dropped down from the top. The hinges of the door were about three feet from the bottom. It was a box made of thick boards, or inch or inch and a quarter plank. It seemed to be from the outer lining to the inner lining a space of about four inches. Whether it was stuffed with sawdust or charcoal, or anything of that kind, I know nothing.

Q. 15. How was this door opened?

A. It seemed to open from the top, and drop down towards the ground.

Q. 17. What, if anything, did you observe inside the box?

A. I saw some ice in there ground up or broken in small pieces, and some fish covered over with the ice so broken—that's all.

Q. 18. Did you see any perpendicular metallic tubes or pipes inside of the box?

A. No.

And at page 156 he testifies thus:—

X-Q. 8. When first was your attention called to the size, make and general description of the ice-box which you have described, with reference to your giving any description of it.

A. Well, as regards the date of the year, that I can't say; I have no memory as regards the year or the time of the year; but in this way I will state it: Seeing the cellar open, and having occasion to go down there on some private business, I saw some of Mr. Racey's help to work with the ice grinding machine grinding ice there, and from the fact of their grinding the ice there I saw the ice-box.

An attempt was made to discredit Joseph H. Racey, Jr., by testimony respecting his character for truth and veracity.

This effort entirely failed. The witnesses called for that purpose were—

George W. Wingate,
D. S. Riddle,
Peter H. Miller,
Aaron Hardman,
Gilson Carman,

William H. Middleton,
William M. Rogers,
Thomas Boese.

Wm. M. Rogers admits that at the time he was examined he was not acquainted with the character of Racey, and had not been for seven years [page 242, q. 21]. He was examined in 1869, and he had not been acquainted with his character since before 1862 [page 244, x-q. 27].

Wm. H. Middleton. The question put to this witness respecting the character of Racey was in the present tense, but as he was not acquainted with his character at the time of his examination, in 1869, his answer was in the past tense [page 229, q. 3 and 4], and the time when he professed to have been acquainted with his character is shown to have been before 1865, as appears in his cross-examination. [page 230, x-qs. 15 and 16]. From cross-questions 18 and 19 it appears that the Appellee was manufacturing testimony respecting Racey's character pending the examination, as all the knowledge which this witness had of Racey's character he received from Piper the day before the examination.

Aaron Hardman could not testify as to the reputation of Racey at the time of his examination in 1869, because, as he says [page 219, q. 15], "I don't know anything about his reputation at present." This Hardman was a party opposed to Racey in a litigation extending from 1859 to 1863. He says that at that time he heard Racey spoken of as a bad man. He might have heard him so spoken of by his attorney, Riddle, who had quarrelled with Racey, and appeared to be practicing law in Centre Market, among the stalls of the fish dealers, or hunting up something there to practice on.

Thomas Boese. This witness says that, at the time of his examination, he was not acquainted with the general reputation of Racey for truth and veracity [page 215, q. 60.] From what this witness says [page 213, q. 51] it appears that what had been said against Racey's character for truth and veracity came chiefly from the party and attorney opposed to him in the litigation.

The four witnesses above named not being acquainted with the character of Racey at the time of his examination, and not having been acquainted with it for some six years, by well settled principles of law, were incompetent to testify as to his character.

George W. Wingate was attorney against Racey in a controversy which terminated in 1863, and although the question is asked him as to Racey's reputation at the time he testified, it appears from the whole of the examination upon that subject that he had no knowledge in regard to it subsequent to the termination of the litigation some six or seven years before the time of his testimony, and all that he learned in regard to Racey's reputation came from parties connected with that litigation. It also appears that while this witness was being examined, he was in fact acting as counsel for the Appellee; that the amount he was to receive for his services was unliquidated, and he was under the temptation of making it appear that his services were of great value to the Appellee. [Page 185, cross-question 164 to 168, inclusive; page 187, cross-question 179; page 188, cross-questions 197 and 198.]

D. S. Riddle was the attorney against Racey all through the protracted and angry litigation referred to, and he and Racey appear to have quarrelled and had much trouble with each other [page 202, qs. 84, 85, 86 and 87]. At the time Mr. Riddle was examined he had been acting for Mr. Piper in hunting up testimony, drawing affidavits, etc. [page 205], and had received some money for the same, and expected still to receive an additional unspecified sum [page 206, qs. 116, 117, 118]. Of course he had a motive in causing his testimony to be favorable to Piper and unfavorable to Racey. Notwithstanding this witness testifies on his examination-in-chief as if he were acquainted with the character of Racey at the time of his examination; it appears from his cross-examination [page 207, x-q. 126] that he had no communication with any one with whom Racey transacted business or was dealing after the fall of 1861.

GILSON CARMAN. This witness is interested in sustaining the Piper patent. He is a member of the firm of Middleton, Carman & Co. [page 100, questions 3 & 4], who were the agents of Piper for the sale of all his frozen or preserved fish, and had been since 1859. They were also using, by Piper's permission, an apparatus erected under Piper's patent [page 119, cross-question 212 to 235]. Carman was also a licensee of Piper [Piper's deposition, page 285, answers 160 & 161]. (It does not appear that he paid anything for this license.) Although this witness says that he has heard people speak of the character of Racey, and that he knows his general reputation for truth and veracity, and says that "it is bad wherever he is interested," yet, on his cross-examination, it appears that he can't name a single person whom he has heard so speak of him, nor a single time when he has heard anything of the kind, and finally winds up by saying that he *thinks* he has so heard, which has given him the general impression he has [page 228, q. 9 to 18].

In support of Joseph H. Racey, Jr.'s, character for truth and veracity the following witnesses were called:—

Jacob L. Seixas.
Jacob Michaelis.
Joseph Murphy.
Cortland Schuyler.
Patrick Collins.
Wardrop J. Hall.
Richard Briggs.
Edmon Blankman.
Robert L. Lomas,
John M. Leaman,
Edwin Nichols.

JACOB L. SEIXAS is a wholesale merchant in the city of New York; knows Racey's reputation for truth and veracity, and has known him for twenty-five years. He says Racey's reputation for truth and veracity is "very good." [Page 374, questions 1, 2, 3, 4.]

JACOB MICHAELIS is a merchant in New York city, and has known Racey eleven years, and as to his reputation for truth and veracity says he "knows nothing but good of him." [Page 377, questions 1, 2, 3, 4.]

JOSEPH MURPHY is a landscape gardner, and late Superintendent of Public Parks in New York, and Deputy Collector of City Revenue; has known Racey upwards of twenty years; knows his reputation for truth and veracity; says it is "good." [Page 380, questions 1, 2, 3, 4, 5.]

CORTLAND SCHUYLER keeps a stand in Centre Market; has known Racey for ten years, and knows his general reputation for truth and veracity, and says it is "good." [Page 381, questions 1, 2, 3, 4.]

Patrick Collins, Clerk of Centre Market. He, of all other persons, must have had the best opportunity to become acquainted with Racey's reputation for truth and veracity; has known Racey ever since he was a boy, for thirty years; is acquainted with his reputation for truth and veracity, and says it is "very good." [Page 408, questions 1, 2, 3, 4, 5, 6.]

Wardrop J. Hall, retired from business; a Director in Manufacturers and Merchants' Bank of the City of New York, in which bank Racey transacted his business. [Page 412, question 4.] Has known Racey for thirteen years [question 3], is acquainted with his general reputation for truth and veracity, and says:—"To my own knowledge it is unexceptionable." [Page 413, question 19.]

Richard Briggs, fish dealer in Washington Market, of firm of Parks & Briggs, has known Racey since 1853; knows his general reputation for truth and veracity, and says:—"I know it to be good." [Page 456, questions 1, 2, 3, 4, 5.]

Edmon Blankman, member of the New York bar; known Racey twelve years; knows his general reputation for truth and veracity, and says it is "good." [Page 458, questions 1, 2; page 459, question 12,] and says, X-Q. 16, 17, as follows:—

> X-Q. 16. How many times have you heard his character for truth and veracity spoken of? State as near as you can.
>
> A. I cannot tell the number of times, but I have frequently heard him spoken of as a good and

truthful man, as a good and affectionate son to his mother and father, and as a kind brother to his sisters and his brothers.

X-Q. 17. Whom have you heard speak of it in that way?

A. I have heard his sisters, brothers, father, mother and people who are strangers, Mr. Martinez, Mr. Michaelis—well, a great many others whose names I cannot recollect; I never heard anybody speak badly of him in my life; all whom I have heard speak of him spoke well of Mr. Racey, and I would believe him under oath or I would believe him on his word as quick as any man I ever knew.

Robert L. Lomas is in the dry goods and other business, known Racey for twenty-five years, knows his reputation for truth and veracity and says it is "good" [page 491, q. 1, 2, 3, 4, 5.]

John M. Leaman is a butcher in Centre Market for forty years, has known Racey for thirty years, and regarding his reputation for truth and veracity says he "never heard anything against it" [page 492, q. 1, 2, 3, 4, 5].

Edwin Nichols, formerly in the stove business in the City of New York, has known Racey thirty years and knows his reputation for truth and veracity, and that it is "good" [page 494, q. 1, 2, 3, 4].

Here are eleven good and reliable witnesses examined in support of Racey's good character for truth and veracity. None of them are enemies to or even knew Mr. Piper, and none of them are friends or even knew the

Appellants in this case. They were entirely disinterested witnesses, having no interest in the subject-matter of the suit, and no bias for or against either party thereto. They are, therefore, in respect to qualifications rendering their statements reliable, entirely unlike the witnesses called to impeach Racey. This attack, therefore, of the Appellee, upon the character of Racey, was not only a failure, but the collision it produced had the effect of rubbing up the reputation of the old fish dealer, causing his excellent qualities to shine more brightly than they otherwise would have done.

The Appellee attempts to contradict Racey's statement that he sold Spanish mackerel which had been frozen or partially frozen, to W. M. Rogers & Co., prior to 1859.

But the result of it was that no one of the members of that firm remembers any such purchase.

But it does appear from the bill [page 488 of the Record], and from W. H. Middleton [pages 487, 488], that Racey did sell fish, Spanish mackerel and bass, to Rogers & Co., in 1857 and 1858.

It will also be remembered that Racey doesn't pretend that he sold the fish in a frozen state.

It is claimed that Racey purchased frozen fish of Middleton, Carman & Co., and therefore could not have had a freezer of his own.

But it is to be remembered that Racey's business was small, and that the house referred to was the largest fish house in New York, and that even Middleton, Carman & Co. bought frozen fish of these Respondents and other parties.

VIII.

The Court below erred in overruling the exceptions taken to the Master's report and in confirming that report.

After the submission of the draft report by the Master to the respective counsel, and while it was still under consideration, and before the preparation of the final report, counsel for the Appellants filed with the Master a motion for leave to take further testimony as to the transactions of the year 1870 [page 24, folio 40; page 27, folios 45, 46].

This motion was refused by the Master, who decided "as matter of law that, at the time when said petition was presented, it was not competent for the Master to hear further evidence or entertain said petition" [page 24, folio 40].

To this ruling of the Master an exception was duly taken [page 72, folio 122].

This, together with the other exceptions of the Appellants, was overruled by the learned Judge at the Circuit. [See opinion of Court, page 571, and final decree, page 73.]

This petition for leave to introduce further testimony was supported by affidavits of the only two men who worked Appellants' apparatus at Charlestown in 1870.

The object of this petition was to show that during the whole of the year 1870 the Appellants' apparatus was used in the manner and only in the manner which the Master, at pages 12 and 16, reports to be not an infringement.

In the denial of this petition for the cause stated by the Master he was plainly in error, and the Court below should have recommitted the report with instructions for the taking of further testimony in accordance with the prayer of the petition.

Pattison *vs.* Hall, 9 Cow., N. Y., 760.
Tyler *vs.* Simmons, 6 Paige Chan., N. Y., 130.
Bodge *vs.* Hull, 59 Me. 225.

Neither the draft nor final report of a Master is in the nature of a judgment. The draft report is subject to modification, and until the final report leaves the hand of the Master the whole subject is within his control. He may exercise a reasonable discretion, and his duty is to ascertain the truth and preserve the rights of all parties.

Equity rule 77.

I.

THE OPERATIONS OF 1870.

The Master finds that the apparatus was altered and that the use of the apparatus as altered would not infringe the Appellee's patent [pages 12, 16].

This ruling is not only confirmed by the testimony of Hervey Waters, who was called by the Appellants, but this witness further proves that the apparatus was used as altered, and on the 16th of December, 1870 [pages 64, 65].

The Appellant, Seavey, also testified before the Master that the apparatus was used with these alterations, [pages 16, 17,] and was asked to produce an account showing the quantity of fish frozen and preserved in the apparatus "after the said alteration" [page 17], which account was produced by Mr. Clapp [page 65]. This is the only account of any operations in 1870, and the Master [page 14] embodies the whole of this account in his finding against the Appellants [pages 14-23].

The claim made by the Appellee was that when the Appellants used the apparatus they in some way *restored* it to its original condition.

Upon this claim the burden of proof was on the Appellee; there was no presumption of law or fact against the Appellants which they were required to overcome by the production of any evidence.

The only remaining testimony on the subject was the visit made by the Master on December 12, 1870, on which occasion the Appellant, Seavey, his counsel being absent, denied the Master the privilege of examining the part of the apparatus then in use, [pages 16, 17,] and it seems that because of this denial, which Appellants' counsel knew nothing of until the Master's draft report was submitted, the Master disregarded the testimony of Seavey and Waters. As soon as this denial became known to Appellants' counsel, and because of this denial, he presented the petition above referred to, to introduce additional testimony to show the exact state of the apparatus in 1870 and how it was used.

The Master's report should therefore not have included the profits of the year 1870, and the Court erred in confirming the report in that regard.

II.

THE OPERATIONS OF 1868 AND 1869.

The exceptions taken to the Master's report covering these two years, and which were overruled by the learned Judge, are printed on page 73, folio 123.

After the decision of the Circuit Court against the Appellants in the process for contempt, the Appellants admitted their liability to account for the gain and profit made in their operations at the Fruit House, Cambridge.

They produced their account, kept as in previous years, in a pass-book. This account was accepted as correct so far as it stated the quantity of fish put in, the prices paid, the quantity taken out, and prices received for the fish sold, and is questioned only in one particular, viz.: As to the price paid as rent or storage to the companies which owned the building.

The entry of rent in the pass-book kept by the Appellants was entered under the head of Exp. in 1868, $3,500; in 1869, $4,000. [Page 19.]

These two items the Master disallows. His reasons for disallowing them, as stated in his original report [page 20], are these, viz:—

1. The meager proof made by the Appellants touching the terms of their agreements with the Fruit Preserving Companies.

2. The discrepancies between the expenses of 1866 and 1867 and the rent paid.

3. The entry on the books of Appellants expressing the charge.

In his additional report he finds [pages 24, 25]:—

> 1. That the Appellants paid to the Fruit Preserving Companies both sums, viz., In 1868, $3,500, and in 1869, $4,000.
>
> 2. That the services and rent were in value far below the sums paid.
>
> 3. As a *conclusion from the evidence reported*, that there was some arrangement by which the whole or some part of these sums was to be paid back to the Appellants, or that they were paid as a reward to induce the companies to infringe the patent of Appellee and violate the injunction of the Court, and therefore are not to be allowed as items of expense [page 25].

These reasons, findings and conclusions are manifestly wrong.

An examination in detail will demonstrate this.

(*a.*) *As to the arrangement with the fruit preserving companies.*

The agreement for 1869 was originally in writing.

It was not, however, in the hands of Appellants, but in the custody of the Fruit Preserving Company.

This the Master finds as a fact [page 18].

And Mr. Pike, the Superintendent of the company, testifies that he had it in December, 1869, when he testified in the hearing on the process for contempt and would not produce it.

Master's Rep. Exhibit M.; p. 59.
See also Seavey's testimony, p. 31; p. 38, q. 122; p. 41, q. 152.

The Appellants were called on by Appellee to produce this written contract, which the evidence showed, even to the satisfaction of the Master, that they had not in their possession [page 18].

The Master, however, holds them at fault for not producing it [page 20], and reaches the conclusion that it was a collusive agreement, as stated on page 25, and applies this conclusion to the year 1868, when it is not pretended there was any written agreement.

It is submitted that had there been no other evidence as to the nature of that contract, such a conclusion is in violation of law.

There was before the Master full and ample evidence of the terms of the contract.

The contract for both years, 1868 and 1869, is stated by the several parties to have been this:—

The Appellants hired of the Fruit Preserving Companies the right to fill a certain space in the fruit house, called the freezing rooms, with such articles as they chose. The Appellants were to deliver the articles at the fruit house, where they were to be received, taken charge of and manipulated by the employees of the companies, and delivered to the Appellants, when called for, in as good order and condition as they were when received. The companies were to do all that was necessary to preserve them, to furnish all material and labor, and were to take all risk of loss while in their charge, and for the use of this space, for the services to be rendered and the risk assumed, the Appellants agreed to pay whether they used the space or not, and did pay for the year 1868 the sum of $3,500, for 1869, $4,000.

The contracts were made with two different companies, the Boston Fruit Preserving Company in 1868, and the Massachusetts Fruit Preserving Company in 1869.

Master's rep., page 11, 18.
Seavey, page 31, page 39, Q. 123 to 130; page 42, X-Q. 9 to 11; page 43, Q. 3 to 8.
Doolittle's Dep. page 43, Q. 3 to 5; page 47, Q. 106; pages 49, 50, X-Q. 1 to 11 and 16.
Brown's Dep., pages 50, 51, Q. 21 to 46.
Pike's Dep., page 59, Q. 1 to 13; page 61, Q. 36 to 40; page 62, X-Q. 1 to 5.

Mr. Brown and Mr. Seavey are the Appellants; they made the contracts on their part; Messrs. Pike and Doolittle represented the companies as superintendents and Mr. Pike as treasurer, and although he did not make the contract, which was reduced to writing, for 1869, he had the custody of it, collected the rent, and personally directed the work done at the fruit house under it.

He is asked [Q. 38, page 61,] to state the substance of the contract, and does so.

There was, then, before the Master the evidence of every person connected with the making and executing of the contract.

What further testimony could possibly be adduced in relation to the contract of 1868, which was never reduced to writing, we fail to see.

It is submitted that the fullest proof that could possibly be produced as to the terms of these contracts was before the Master.

(*b.*) *As to the difference in expense between the years* 1866 *and* 1867, *and* 1868 *and* 1869.

In stating the expenses of the years 1866 and 1867, the Appellants make no charge for interest on the capital invested, wear and tear and depreciation of their apparatus, for their own time in superintending, for carting, for labor bestowed by regular employees, nor do they claim or estimate any profit on the work done at the freezer as a separate business.

It is absurd to suppose that a stranger, disconnected with their general business, could or would take their Charlestown apparatus and freeze fish for them or any third party for just the bare cost of the labor expended, the materials used and the rent paid.

A profit would be charged on every element of expense, and, in addition, a charge for the time bestowed and the risk assumed, and the owner of such an apparatus would undoubtedly estimate the probable length of time his machine or apparatus would last, and add wear and tear to both cost and profit.

In determining, therefore, whether or not there is so great a discrepancy between the expenses incurred by the Appellants in running their own apparatus, and the amount they pay another party for doing a like work, as inevitably to lead to the conclusion that the sum thus paid was not paid in good faith, the purposes and circumstances of each must be considered.

The Appellants did not run their apparatus as a distinct business, intending and expecting to make a profit on the work done there, but only as an incident to their general business, making their gain or profit from the sale of the articles frozen or preserved.

The fruit preserving companies, on the contrary, derived their sole profit from the gain made in the business of freezing and preserving. The salaries of their officers the interest on the capital, insurance, labor, materials, wear and tear, all had to be paid before any profit could be realized and dividend paid to stockholders.

The cost to them was greater than to an individual, and had they simply charged the actual cost of labor expended and materials furnished, it would have resulted in a loss to them.

It is evident, therefore, that so far as the fruit preserving companies were concerned, there is no inference to be drawn against the perfect fairness of the contracts made. They were to keep the rented space at all times ready for use, and their only possible profit resulted from their charging an excess over the actual cost of running the apparatus.

Any inference from the facts reported by the Master, which implicates or connects these companies with a fraudulent or collusive agreement, such as the Master states, is wholly unwarranted.

In order to sustain the conclusion of the Master, both the fruit preserving companies and the Appellants must have become parties to the agreement.

If the evidence fails to connect them both, the result attained by the Master is manifestly wrong.

(*c.*) As the Master finds that the two sums of $3,500 and $4,000, were actually paid by the Appellants to the fruit preserving companies, the manner in which the payments were entered on the books of Appellants can furnish no sufficient reason for disallowing the amounts.

(*d.*) The Master finds that the sums paid were far above the value received.

The suggestions under the third point, *b*, apply to the consideration of this finding.

There was no competition with the fruit preserving companies. They put their own price on the service rendered. In ascertaining what those services were fairly worth, it becomes necessary to learn the original cost of their apparatus, the cost of operating it, including, of course, the salaries paid to officers and employees. Upon these points the Master had no evidence.

It was in evidence, however, that they employed a superintendent and a treasurer; that Nathan Robbins paid for a small part of the space the Appellants were entitled to, $600, and that for a period less than a year; being a little more than one-sixth of the entire rent for 1868.

Nickerson, p. 32.

It also appears that the Massachusetts Company increased the rate from $3,500 to $4,000; that on the operation of 1868, the Appellants made a profit of $777.25 [p.

12] after paying the amount of rent and other incidental expenses, although the quantity of fish frozen was much less than in any preceding year, and if the prices received in 1868 had been maintained in 1869, their profit on the operations of that year would have been within $100 or $200 as great as that made on a like quantity of fish frozen by them in 1867.

Rep. pp. 12, 22.

There was no evidence before the Master upon which this finding can be based, except the difference in the cost of running the apparatus of Appellants at Charlestown, and the amount paid to the Fruit Preserving Companies, and this, we submit, furnishes no basis for this finding.

(*e.*) The conclusions of the Master should be supported by the evidence.

They are not.

Mr. Seavey, Mr. Brown, Mr. Doolittle and Mr. Pike each state the terms of the contract with the Fruit Preserving Companies. Each of them was called and examined by the Appellee. There is nothing to contradict or control their evidence.

Messrs. Pike and Doolittle are in no wise interested in the result of the suit.

They state the terms of the contract in answer to inquiries from the Appellee. There is not a particle of evidence from them which tends to show that any part of the sums paid by the Appellants to the Fruit Preserving Companies was ever paid back.

No such inquiry was addressed to any one of the witnesses, but the Appellee chose to put in the fact that the sums were paid, and to leave the subject there, making no attempt to control the testimony, but apparently accepting the statements.

The Appellants produced the receipts given them for the sums paid [p. 19], they testified to the payments, and the persons to whom the payments were made testified to receiving the money.

Seavey's Dep., p. 35, qs. 77, 78.
Doolittle's Dep., p. 47, q. 103.
Pike's Dep., p. 59, q. 3; p. 62, cross-q. 5.

The Appellee had the fullest opportunity for showing any fact which would tend to prove that any of the money thus paid was returned to the Appellants.

None was presented.

Nor is there the slightest evidence tending to show that the sums paid to the fruit preserving companies were paid as a reward or inducement to infringe the patent of Appellee and the injunction of the Court.

But assuming, for the sake of the argument, that they were paid for that purpose, the Court has already imposed its penalty for that, and it was no part of the duty of the Master to impose penalties or assess damages. He was to ascertain, by computation, the actual gain in money made by the Appellants in practising the art or process patented by the Appellee, by ascertaining the difference in money between the money actually expended and the money actually received, according to the rule laid down in Mowry *vs.* Whitney; to state the accounts precisely as a merchant would state the account of his own business in order to ascertain the profit or loss.

(*f.*) The standard adopted by the Master in determining the expenses of the years 1868 and 1869, as allowed by him, is radically wrong.

He assumes that the Fruit Preserving Companies could do the work of freezing and preserving as cheaply as the Appellants did it, and that they were not to be allowed anything more than the actual cost to them.

This is manifestly wrong. The Appellants had no regular superintendent of their apparatus, the Fruit Preserving Company did; the Appellants charged up their apparatus only when needed, and usually from the middle of June to some time in November or December, and then only such portion as they intended to use.

The fruit preserving companies were required to keep their rooms charged at all times ready for use for an entire year. The Appellants did not carry on their apparatus as a regular business; the fruit preserving companies did; the Appellants charged nothing but actual expenses; the fruit preserving companies had to include in their charge as part of the expenses, interest on their capital, insurance, repairs, depreciation, salaries, a reasonable sum for risk of loss by deterioration of the articles received, and, in order to make the business pay, a margin for profit.

The true statement of the accounts of the years 1868 and 1869, upon the principle adopted by the Master in stating the accounts of the previous years, is as follows:—

1868.

Receipts	$7,508 93
Cost and expenses	6,730 78
Profit without deducting any expenses of sale.	$778 15

1869.

Receipts	$ 8,551 33
Cost and expenses	10,148 33
Loss incurred by B. and S.	$1,596 70

Master's Rep. p. 12.

IV. *The loss incurred by Appellants in the year* 1869 should be deducted from the aggregate of profits made in other years.

Troy Iron and Nail Factory *vs.* Corning, 6 Blatch., 328.

Rubber Company *vs.* Goodyear, 9 Wall., 788.

V. *The true account of gain or profit of Appellants.*

Adopting the rule laid down by the Master for ascertaining profit, viz: the difference between the money paid and the money received, the true statement is this, viz:—

1866	$1,223 43
1867	1,197 20
1868	777 25
1869	.....
	$3,197 88

Not allowing anything for the expense and cost of selling.

From this amount the loss of 1869 should be deducted.

The account should be stated thus:—

Amount of profits for 1866, 1867 and 1868	$3,197 88
Less loss in 1869	1,596 70
Making	$1,601 18

which, under the most favorable rule, the Appellee would be entitled to recover.

Under the rule laid down in Mowry *vs.* Whitney, the facts reported by the Master show that the Appellee would not be entitled to anything.

VI. *As to the first claim of Appellee.*

Rep. pp. 14, 15.

The Appellants submit that the calculations and findings of the Master as to the gain made, are not warranted by the evidence.

The disallowance of the claim was correct.

Geo. Gifford
Edwd Avery
for Applts

SUPREME COURT OF THE UNITED STATES.

No. 239.

JAMES BROWN AND WILLIAM SEAVEY, APPELLANTS,

vs.

ENOCH PIPER.

BRIEF FOR APPELLEE.

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ENOCH PIPER.

BRIEF FOR APPELLEE.

BOSTON:
ADDISON C. GETCHELL, LAW PRINTER,
53 WASHINGTON STREET,
1875.

BRIEF FOR APPELLEE.

This is an appeal from a final decree of the Circuit Court of the District of Massachusetts, for a perpetual injunction restraining the appellants from the use of the invention patented to the appellee by United States letters patent dated March 19 1861, and for profits and costs.

The questions raised are as to —

I. THE NOVELTY OF THE PATENTED INVENTION.
II. INFRINGEMENT BY THE APPELLANTS.
III. THE AMOUNT OF PROFITS.

I. NOVELTY OF THE PATENTED INVENTION.

The patent is for an improvement in the art of preserving fish, &c. It is printed on pp. 74–76 of the Record.

The patentee describes his invention as a *method* of preserving fish, &c.

The term "preserving," as used in the patent, clearly includes *freezing and keeping frozen.*

The description and specification make the object of the invention plain. It is to provide a mode of freezing fish and other articles of food, and preserving them in a frozen state, by which they may be conveniently kept in any desired quantities and for any desired length of time.

The patentee refers to the common method of packing fish "with crushed ice in barrels or boxes," which, he says, "owing to the melting of the ice, and the consequent moistening of the fish, fails to preserve them fresh and good for more than a month at most."

He states that his invention "consists in a method of preserving fish and other articles by placing them within a chamber, and cooling the latter [meaning of course the *air in it*] by means of a freezing mixture, so applied that no communication shall exist between the interior of the preserving chamber and that of the vessels in which the freezing mixture is placed;" and he says, "*The temperature* of the preserving chamber can be maintained for any length of time below the freezing point, and fish, *surrounded by this dry and freezing atmosphere*, will be preserved as fresh and good as when first caught, and for a much longer period than by any other method known to me."

He says that the *apparatus* for freezing the fish, &c., and keeping them in a frozen state, may be constructed "*in various ways and of different shapes*," and that the apparatus shewn in the drawing will suffice to *illustrate* the principle and mode of operation. And afterwards, "*I do not desire to be understood as confining myself to the use of the specific apparatus above described.*"

The described method is this: The atmosphere of the chamber in which the articles are placed, which is kept from communication with the external air by means of non-conducting walls, is reduced to, and kept at, a temperature below the freezing point of water by means of a freezing mixture, having no contact with the freezing atmosphere of the chamber; and the fish, &c., immersed in this atmosphere are frozen and kept so, and also kept from deterioration as if they were in a natural freezing atmosphere.

This atmosphere, in which the fish, &c., are frozen and kept, is described in the patent as a "*dry and freezing atmosphere.*"

The apparatus referred to for illustration, when used as described in the patent, is adapted to produce such an atmosphere; viz., *freezing*, because exposed to the influence of the freezing mixture, and protected by double non-conducting walls from the outer air; and *dry*, because there is no communication between it and the freezing mixture or the outer air.

The claim is in apt words to secure such an invention as has been described. It is —

"Preserving fish or other articles in a close chamber by means of a freezing mixture having no contact with the atmosphere of the preserving chamber, substantially as set forth."

The practical result accomplished by the invention thus patented is, that in a room or chamber suitable for storing fish, &c., in desired quantities, and from which they may be taken as desired, *the atmosphere is kept below the freezing point* and in a *dry* state.

The patent cannot be construed as for the apparatus described. It is not a patent for a machine or a manufacture within the meaning of the act of 1870, § 24, allowing patents for an "art, machine, manufacture or composition of matter," but it is a patent for an improvement in the *art* of preserving fish and other substances from decay. The patentee calls it a method. It is really for a peculiar process. Neither term is used in the patent act, but either sufficiently indicates the nature of the invention, and each is synonymous with "*art*," as that term is used in the act.

Corning *v.* Burden, 15 How. 252.
Curtis on Patents, §§ 9–18.
Tilghman *v.* Werk, 2 Fish. 578.
O'Reilly *v.* Morse, 15 How. 62.

It is plain that Piper's actual invention was of the process or method above described of preserving fish, &c., by artificial congelation, which was capable of being carried out in various forms, and has, in fact, been so carried out by himself, always with very valuable results.

The court, having ascertained what the invention actually was, will give to the patent such a construction as will secure the whole of that invention, interpreting the language of the specification liberally for that purpose, if necessary.

Curtis on Patents, §§ 225, 231, 453, 456, and cases cited.

If the construction here put upon the patent is correct, the question of the novelty of Piper's invention is, not whether the apparatus described in the patent was new, nor whether any apparatus was in existence before his invention which might have been so used as to practise the invention; but whether the patented process as described was in fact so practised.

And to overthrow his patent for want of novelty, it must be proved that before his invention fish or other articles had been frozen and preserved by a process in which the articles were frozen and preserved by immersion in the freezing atmosphere of a chamber, that atmosphere being reduced and kept below the freezing point by a refrigerating mixture, which had substantially no communication with such atmosphere.

Before discussing alleged prior inventions, it is necessary to refer to the evidence shewing the *history of Piper's invention.*

It does not appear that before his invention fish or other substances had ever been really frozen and kept frozen so as to be fit for the market; nor that that has ever been done since his invention, save by the use of it; and it clearly appears that the use of it has added largely to the value of the fish business in this country. Between 1858 and 1868, nearly 73,000 pounds of salmon preserved by Piper's process were sold by his agents in the city of New York. The sales for the last of those years were 52,514 pounds. The selling price during the first nine years was from sixty-five cents to one dollar. The selling price during the tenth year was forty to sixty cents.

G. W. Middleton, Rec. pp. 131, 132, 133; direct 16, 25–33.
E. G. Blackford, Rec. pp. 134, 135–137; direct 5–7, 16, 17; cross 55.
W. H. Middleton, Rec. pp. 142, 143, 144; direct 9–16, 21–23, 25.
Carman, Rec. p. 100; direct 8, 69, 70–77.
W. M. Rogers, Rec. pp. 240, 243, 244; direct 1–9; cross 8–20.
E. Piper, Rec. p. 267; direct 53–59.

He was engaged in the coasting business, in a neighbourhood where the business of exporting salmon to points further South was carried on.

His *experiments began in the winter and spring of* 1858.

Piper, Rec. p. 260; int. 2.

In the *spring of* 1858, he froze a few fish, principally to ascertain *whether fish artificially frozen would be the same as those naturally frozen.* The result was satisfactory. He used for this purpose a small temporary apparatus, of which *Piper Model No.* 1 is a representation. This had a chamber, the air in which (being the air that the fish lay in) was reduced and kept below the freezing point by the influence of freezing mixture put around the chamber, but having no communication with the atmosphere thereof. Suitable means of drawing off the pickle were provided.

Piper, Rec. pp. 260, 261, 272; direct 5–11; cross 32–38.

In *June* 1858, he constructed and used the apparatus of which *Piper Model No.* 2 is a representation. This had two chambers, the air in which (being the air that the fish lay in) was reduced and kept below the freezing point by the influence of freezing mixture contained in vertical tubes within the chambers; the space around the chambers being packed with a non-conducting substance, having no communication with the atmosphere of the chamber. Suitable means of drawing off the pickle were provided. The use of this apparatus, in the manner described, was a complete reduction to practice of the invention which is the subject of Piper's *first patent.* The apparatus was made to be used, and was in fact used, so as to carry out the patented process.

Between forty and fifty salmon were frozen in one of these chambers, the latter part of June and first of July 1858, and were preserved in a frozen state in the other chamber from that time till about the 1st of December following, when they were taken out, brought to Boston, and sold to Wm. M. Rogers & Co., of New York.

Piper, Rec. pp. 261–263, 272, 273, 283; direct 12–23; cross 39–59, 139, 140.

Eliza Piper, Rec. pp. 286, 287; direct 6–10, 25, 26.

John Marston, Rec. pp. 295, 296; direct 14–16.

Gilson Carman, Rec. p. 100; direct 8.

This apparatus, and the new process of freezing and preserving fish, are described generally in Piper's *caveat*, filed in July 1858.

Rec. p. 307.

Piper has furnished frozen salmon every year since to Rogers & Co. or their successors.

Piper, Rec. p. 263; int. 24.
G. Carman, Rec. p. 100; direct 8.

His *Patent Office model* was made in December 1858; and a similar model is produced in two parts, marked *Piper Model No.* 3, *A;* and *Piper Model No.* 3, *B.*

Piper, Rec. p. 263; int. 28, 29.

It was in an apparatus like the Patent Office model that he froze and preserved the catch of 1859.

Piper, Rec. pp. 264, 274, 275, 281, 282; direct 32, 34–37; cross 63–69, 80–82, 121–129.

For *preserving* the fish in a frozen state he used the *preserving chamber* of that apparatus up to 1865. (*Piper*, Rec. p. 264; int. 33.) He *froze* the catch of 1860 and subsequent years till 1865, using the freezing part (No. 3, *B*) of that apparatus a little differently from the mode described; that is to say, he put the fish in the pans, and the freezing mixture around them. (Rec. p. 263; int. 30. *Eliza Piper*, Rec. pp. 286, 287; direct 16, 24.) He found it froze the fish *quicker*. (*Piper*, Rec. p. 265; int. 47. See also Rec. pp. 278, 279; cross 89–97.) But *the process* was the same.

His *Patent Office Model* for *his second patent* (*i.e.*, that dated August 5 1862) was made in May 1862. In the same month he put up an apparatus of that construction in New York for the use of his selling agents, Middleton, Carman & Co. In the spring of 1864 he put up similar apparatus at St. John, N.B., and used it for freezing and preserving fish, and, except during the summer of 1866, has used it ever since.

Piper, Rec. p. 265; int. 41–46.
Middleton, Rec. p. 130; int. 8–14.
Carman, Rec. pp. 100–105.

But as early as 1860 he constructed a model shewing the main parts of this apparatus patented in 1862, viz., the non-conducting walls, the receiving pans, and vertical descending tubes connected with the pans by flanges, making the pans readily movable. This model is produced, marked Piper Model No. 4.

Piper, Rec. pp. 264, 265; int. 38–41.
Eliza Piper, Rec. p. 287; direct 27–31, 18.

Before passing from this part of the case, we may allude to the use of *salt and ice* in the *same chamber* with the fish, as it may be suggested that Piper's actual invention included, and that his first patent includes, such use.

(1.) It made no part of his invention. If he ever tried it at all, it was merely as an experiment, the result of which was not satisfactory. (*Piper*, Rec. pp. 269, 270, 271, 278; cross 1–27, 82–88.) A statement that he contemplated such a use was inserted in his original application for his first patent (Rec. p. 548), but was omited in his amended specification in which the patent was granted (Rec. p. 554). It was so inserted in the original application by mistake of the solicitor. (*Piper*, Rec. p. 271; cross 28, 85–88.)

(2.) Such a mode of using salt and ice is expressly excluded by the language of his patent; and the objections to such a use are (1) that the atmosphere of the chamber is corrupted by intermingling with the salt and ice, so as to affect the flavor or appearance of the fish; and (2) that where such communication exists, the salt and ice cannot be replenished, as it needs to be every few hours, without admitting the external warm air to the atmosphere of the freezing or preserving chamber, and thus preventing the necessary freezing temperature from being maintained.

The Benjamin & Grafton Patent.

It is contended by the appellants that the process patented in Piper's patent of March 19 1861 is found described in the English patent granted to Benjamin & Grafton in 1842, the specification of which is printed at Rec. pp. 557, 558.

This patent describes *two* plans for preserving fish, &c., one of which is applicable when these articles are to be preserved for a long time, and the other when they are to be kept preserved for a short time.

The first process is to *immerse them in water* in a metallic or other vessel, which is deposited in a freezing mixture contained in a wooden trough, and left until the water and fish are frozen in a solid block.

This process has *none* of the elements of Piper's, except that freezing mixture is used. There is no *dry freezing atmosphere* to put the fish in; whereas that is the fundamental idea of Piper's invention.

The process described by Benjamin & Grafton must be practically of little or no utility for the purpose, as Mr. Renwick says, "In the first place, the fish cannot be frozen till all the water is frozen. In the second place, there would be a great waste of ice and salt in freezing the surrounding water. In the third place, the ice near the fish, and the fish itself, would have to be frozen by cold applying itself through the ice already formed, which is a good non-conductor, and would thus increase the waste of freezing mixture. Fourthly, there would be a great waste of room in the apparatus, as it would not contain nearly as many fish as it would if no water were used; and lastly, it would be almost impossible to determine when the fish were frozen. And even if the fish were frozen, it would be necessary to transport it from place to place inside of its block of ice, thereby materially increasing the cost of transportation."

Rec. pp. 300, 301.

The *second* process described by Benjamin & Grafton is to employ freezing mixtures to cool the air of a close room made of brick or other suitable material sufficiently excluding the heat of the sun (no non-conducting walls) and the fish having been placed in this room, the air is caused to "circulate against the surfaces of metal vessels containing freezing mixtures by means of *revolving fans* or other suitable means within the room or chamber, the object being to keep the air of the room in constant movement." "By this arrangement," the patentees say, "the fish will be *kept cool* and preserved, and *if it has been previously frozen as before described* (*i.e.*, in blocks of ice), the keeping it in a room or chamber as here described would retain it in a frozen state."

Mr. Waters, expert witness for the appellants, says, that he considers the Benjamin & Grafton processes the same as the Piper process, because in both the fish are frozen artificially by the thawing of ice by means of salt, thereby extracting the caloric from the "*surroundings*" of the fish, and consequently from the fish themselves, and are kept frozen by a continuation of the same means of freezing, the fish being kept from contact with the oxygen of the atmosphere and from any contact with the freezing mixture.

Rec. p. 541, int. 5.

Mr. Renwick, expert witness for the appellee, says, that he considers the Benjamin & Grafton processes *not* the same as the Piper process, and gives his reasons, viz., that the fish is not frozen by immersion in " surroundings " of cold air, which is one of the essentials of Piper's process, but is frozen while in a tank of water, and only after the surrounding water has been frozen. He further says, " I am unable to find in the Benjamin & Grafton patent any description of freezing fish by immersion in an atmosphere of common air, reduced below the freezing point by means of freezing mixtures, contained in vessels whose interiors are practically out of communication with that atmosphere; neither am I able to find any description stating that fish thus frozen are to be kept frozen, and therefore preserved in a similar atmosphere; and this atmosphere, thus cooled and kept from contact with a freezing mixture, is the essential element in working out Piper's process. Benjamin & Grafton further describe a plan for cooling (not freezing) and preserving for a short time; but, in carrying out this latter plan, there is no description that the temperature of the chambers enclosing atmosphere in which the articles are to be immersed is to be kept below the freezing point, nor any description that the freezing mixture contained in the vessels within this room is to be kept out of contact with the atmosphere of the room. The fact that the temperature, both for freezing and for preserving, should be below the freezing point, and that the atmosphere surrounding the fish should be out of contact with the freezing mixture, are both essentials in Piper's process, and described in his patent, and neither of them are described or even hinted at in the patent granted to Benjamin & Grafton."

Rec. pp. 300, 301.

It will be observed that Mr. Waters speaks twice of the *fish being kept from contact with the freezing mixture* as one of the essentials of the process of both Piper and Benjamin & Grafton.

As regards the Piper process, he can only gather the essentials of it from the Piper specification, and there the essential in question is described, *not* as *keeping the fish from contact with the freezing mixture*, but as keeping the *atmosphere of the chamber in which the fish are placed* from such contact.

This, then, is what Mr. Waters means when he speaks of this particular essential of Piper's process.

Now, one of the reasons he gives for the opinion that Benjamin & Grafton describe the same process that Piper does, is that Benjamin & Grafton describe this *protection from contact with the freezing mixture;* and how much his judgment depends upon *this* supposed fact we cannot know. But it is certain that the supposed fact does not exist. It is certain that Benjamin & Grafton do not describe what Mr. Waters thinks they do; that is, they do not describe that protection of the atmosphere of the chamber from contact with the freezing mixture which Piper describes.

They do, indeed, describe the formation of a block of ice around the fish, which block of ice keeps the enclosed fish from contact with anything except the ice; but this is not what Mr. Waters means, for no such thing as this is supposed to be in Piper's patent, and he is speaking of something which he finds in that patent.

This apparent misreading of the Piper specification by Mr. Waters exposes his whole statement of opinion as to the nature of the invention, and its novelty also, to more or less doubt.

As Mr. Waters and Mr. Renwick agree that the absence of any substantial communication between the freezing mixture and the atmosphere of the chamber containing the fish *is* an essential of Piper's process, the court can have no difficulty in disposing of the Benjamin & Grafton patent when it is seen that that patent does not describe such absence of communication.

The appellants volunteered on cross-examination to prove by Mr. Piper that upon the rejection of his application by the Patent Office, as anticipated by Benjamin & Grafton, he went out to England to see them, and "ascertain the fact as to whether any such apparatus was built, and whether any business was ever done with it," and that he did not, while there, see any apparatus claimed to be constructed after that patent, or any freezing apparatus at all.

Rec. p. 280; cross 114–119.

They also sought to prove that Mr. Piper had, in a certain conversation with one Pike, stated what information Benjamin & Grafton had given him of their past doings with their apparatus (*Pike*, Rec. p. 532; direct 31, 33).

Mr. Piper, when recalled, gives a part of the statement which Pike omitted, viz., that he informed him that he ascertained by information in London that Benjamin & Grafton's experiments proved a total failure, after costing a thousand pounds. (Rec. p. 302; direct 2.)

THE "GOOD" APPARATUS AND PROCESS.

John Good, of Philadelphia, invented an apparatus for the preservation of dead bodies, which he patented August 17 1843, and certain improvements thereon, which he patented December 12 1854.

Several witnesses are produced by appellants to prove the use of the apparatus in such a manner as to involve the practising of Piper's process.

The Court will observe that, as regards the validity of Piper's first patent, viz., for the *process*, the mere fact that any previously existing apparatus *could have been* so used as to involve the practising of that process avails the appellants nothing. Doubtless there have been many apparatuses long known, and used in other ways and for other purposes, which might have been used in such a way, and for such a purpose, as Piper's first patent covers. This is nothing more than to say that his first patent is for a *process*, and not for the apparatus, which he has (for illustration) described as suitable for carrying out his process.

The Court will also observe that Piper's invention is of a process by which animal and vegetable substances are completely frozen — frozen through — and preserved in that state for weeks, or months, or years. No such thing is ever required to be done with a human body. It will be found that all the appellants' witnesses claim is, that they used ice and salt to bring the body *more quickly* to that condition to which it is usually brought by the use of ice alone. They used sometimes ice, and sometimes ice and salt; but they did so to accomplish the same result in the two cases.

apparatus, using ice and salt only in the pan placed on the top of the body.

Rec. p. 512; direct 12.

Afterwards he is asked, on cross-examination, when he first so used it, and he answers, "Off and on for *most of the length of time that I have had them.*"

Rec. p. 513; cross 11.

(3.) He used the ice and salt only to get *a quick* result.

Rec. pp. 512 *et seq.;* direct 8, cross 9, 14, 15.

(4.) He did not really *freeze* the body at all. He first says he thinks he has frozen a body in *less than six hours.* (Rec. p. 514; cross 20.) And if he means anything more than freezing the surface, this is impossible. Afterwards he is asked, "Did you ever freeze the body of an adult in an apparatus like the apparatus used in the way inquired of? *Ans.* We have *an idea that they were froze.* Did you know that they were frozen? *Ans.* No, sir. Do you know that the bodies of children have been frozen, using the apparatus in this way? *Ans.* No, sir."

Rec. p. 514; cross 26–28.

John Good's ex-parte affidavit is in the case by consent, in lieu of his deposition. (Rec. pp. 564, 565.) He says, "After taking out my first patent (1843), I occasionally used salt commingled with ice, which I found *froze* the body," &c. "I do not think that I have had occasion to use salt commingled with ice since I received my patent of 1854."

This describes simply the use of *salt and ice* where ice alone had been used before; and referring to the previous part of his affidavit, we find that the ice had been used *in the bottom of the box, under the perforated plate,* as well as in the pan over the body. Ice and salt *thus used* would not involve the process of Piper, because of the free communication between the freezing mixture and the atmosphere of the chamber.

Mr. Waters testifies that *if* the Good apparatus is "used in the following manner, namely, placing the substance to be frozen on the perforated false bottom elevated above the bottom of the box, *the pan*, setting over and into the chamber in which the substance is placed, *filled with ice and salt*, and the outside groove filled with water, and the outside cover put on, so as to exclude the external air from all contact with either the freezing mixture or the substance to be frozen, and so continued long enough to *freeze* the substance in the chamber," the process does not differ substantially from Piper's. (Rec. p. 542; direct 8.) But, as before shewn, there is no satisfactory evidence that the Good apparatus *was ever so used* before Piper's invention; and as to any of the other modes of its use, Mr. Waters' "silence gives assent" to the proposition that *they* do differ substantially from Piper's process.

THE "PIKE" PROCESS.

Charles F. Pike in 1856 made an experiment in a refrigerator, using salt and ice. The evidence in regard to it is furnished by himself and his workman, *Otis P. Underwood.*

The evidence strikingly illustrates the danger of relying upon general statements as to things being "frozen."

Underwood says the meats, fish, &c., put into the apparatus were "frozen." Pike says he was enabled by the use of his apparatus to "freeze" substances placed in the preserving chamber.

Rec. p. 515; direct 7; p. 530; direct 9.

But Underwood says that together with the meat, fish, &c., there was put in on one experiment *a bowl of water*, and *the water was not frozen.*

Rec. p. 520; cross 62.

This single admission puts an end of course to the pretence that Piper's process was anticipated by Pike.

And it is certain there could not have been a freezing atmosphere (viz., below 32°) within the chamber of the apparatus; for there were openings expressly provided to keep up *a current of air from outside*, passing through the apparatus around the walls of the chamber and out of the apparatus at the opposite side. (Rec. p. 519; cross 40, 42, 43.) Whereas non-conducting walls around the air chamber are prescribed by Piper, and are necessary to the practical maintenance of the required temperature in the air chamber.

No attempt is made to prove by any expert (as was done in the case of the "Good" process) that Pike's described use of his apparatus involved the practising of Piper's process.

The fact is, that Pike was engaged in improving *refrigerators* only. He was the owner of the State right under the well-known Schooley refrigerator patent from 1855 to 1865, during which time he built as many as a thousand of the Schooley refrigerators. He tried repeated experiments to get greater cold in those refrigerators, while preserving the essential features of that class of apparatus. It is an advantage in a refrigerator to have a current of fresh air constantly passing through it, "to carry off the perfumes, mould, must, fungus," as Mr. Pike expresses it, "that would arise from any one or all articles in the chamber." There are no such "perfumes," &c., from articles which are really *frozen*. A refrigerator is designed to keep articles cold without freezing them, and at the same time keep them fresh. Hence it is practicable and advantageous to have a current of air from without circulating through the apparatus. He had got the temperature of his refrigerator down to forty or forty-eight degrees by using the apparatus with ice; and his experiment with salt and ice was simply to see if he could not get it colder still, but retaining the current of fresh air through the preserving chamber, and consequently *not having a temperature below the freezing point therein*. The feature in a refrigerator of having a reverberation of the current of fresh air, as Pike had, was patented by Schooley. (Rec. p. 344; direct 4; Rec. p. 515; int. 4; pp. 529, 530; int. 8; pp. 533, 534, 535; cross 1-4, 11-17, 24-31.)

Whatever may have been the object and the intended operation of the apparatus used as described with ice and salt, it was *a mere experiment, and was abandoned*. But one such apparatus was made, and that, after the experiments, was broken up. (Rec. pp. 535, 536; cross 32-38.)

But the testimony of Pike proves somewhat *more than his own failure*.

In 1860 or 1861, the appellants, Brown & Seavey, applied to Pike to build them "a refrigerator for freezing fish." He says that he supposes he described to them his experiments in freezing made in 1856; but they did not give him the order then to make a freezing apparatus for them. (Rec. p. 536; cross 40–42.)

July 16 1862, Pike wrote to Piper asking for the date of *his* patent (the first one — not the second, for that was not then granted), so that he could get a certified copy of it. *Afterwards*, he did proceed to build for Brown & Seavey the apparatus they were sued for using. (Rec. p. 536; cross 43.)

THE "WHITSON" PROCESS.

An attempt is made to prove that one *Willett P. Whitson*, of New York, practised substantially Piper's process, before Piper's invention.

Whitson had two apparatuses; the first is shewn at Rec. p. 384; and the second at Rec. p. 386.

By the use of the first one, he is supposed to have practised Piper's process. But the *time* at which this use is proved is too late to be of any service to the appellants.

The *first* apparatus was constructed and used in *the fall of* 1860 (*Whitson*, Rec. p. 391; cross 78. *Rice*, Rec. p. 526; cross 6, 7), two years and more after Piper's invention.

THE "RACEY" PROCESS.

One Joseph Racey, of New York, claims to have frozen fish by the same process substantially as that which is patented to Piper, and previously to Piper's invention.

Racey had two freezers. The last was built in the latter part of 1859. (*Joseph Racey*, Rec. p. 311; int. 14 *et seq.*)

This was more than a year after Piper's invention in 1858.

Racey's first apparatus was built and put in use, he says, as early as 1856; but his process which he practised therein bore no resemblance to that which is the subject of Piper's first patent.

Racey says (Rec. pp. 309, 310; int. 6) he put in a layer of ice and then a layer of fish, and so on till he got it up nearly to the pan. (See Model No. 2.) This is just what Piper says in his patent was the old and objectionable mode of keeping fish fresh.

Racey also says he put ice and salt in the top pan, by which means he *found the ice in the box did not melt so soon.* (R. P. p. 6.)

He also says that a salmon which he put in there "was not frozen in the style we freeze them now [viz., by the use of Piper's invention]; the salmon was very hard, but would give, — it was frozen to a certain extent." (Rec. pp. 309, 310; int. 6.)

II. INFRINGEMENT.

The appellants have frozen fish and preserved them frozen, in an apparatus which was inspected by Mr. Renwick, and by a method or process which is described by Seavey, one of the appellants.

Renwick, Rec. pp. 82, 83; int. 4–7.
Seavey, Rec. pp. 80, 81.

The mode of using it was to put salt and ice into the pans at the top, from which it passed into the perpendicular tubes, which extended through the chamber, in which chamber the fish were placed on racks or shelves, the temperature of the chamber being kept at from 18° to 24°.

Mr. Renwick says, "I consider this apparatus substantially identical with that described in the patent of Mr. Piper [meaning the first patent]; and that *the process worked out therein, as described by Mr. Seavey, is substantially identical with the improvement in an art or artificial process described in the same patent.*"

Rec. p. 83; int. 6.

Mr. Waters, a distinguished expert, is examined on behalf of the appellants, and *does not controvert either of these statements.* There is really no question of infringement in the case, if the true construction of the Piper patent be as submitted, and the improved art or method or process be new.

III. THE AMOUNT OF PROFITS.

It is found by the master's report, confirmed by the Circuit Court, that the appellants used the patented invention in the years 1866, 1867, 1868, 1869, 1870.

Rec. pp. 11–73.

In 1866 and 1867 they used it by means of an apparatus owned by them, at Charlestown, which they were using when the suit was commenced; they were enjoined by the Circuit Court in 1867, and in 1868 and 1869 preserved their fish, &c., in the establishment of the Boston Fruit Preserving Company and its successor, the Massachusetts Fruit Preserving Company, at Cambridge.

On proceedings in contempt they were held to have violated the injunction by their operations of 1868 and 1869, and were fined therefor; and in 1870 they returned to the use of the Charlestown apparatus, which they claimed before the master, to have altered meanwhile, so that its use in 1870 was not an infringement of the patent.

1. Profits of 1866 and 1867.

The master accepted the appellants' figures of receipts and expenditures for these years. The profit found is $1223.43 for 1866, and $1197.20 for 1867. (Rec. pp. 12, 21, 24, 26.)

The appellants claimed to deduct for each year ten per cent on the gross sales of the year; five per cent as commission on the sales, and five per cent for guaranty.

This claim was rightly disallowed. It is not pretended that the appellants actually paid anything for commissions and guaranty; they bought and sold the fish themselves, on their own account. It amounts to a claim for compensation to the appellants for their own services in committing the infringement complained of. This is never allowed.

If the first and second objections of Schedule I, p. 28, are seriously urged, they are sufficiently answered by reference to the master's additional report, p. 24.

2. Profits of 1868 and 1869.

The appellants' receipts for these years were taken, as stated by them, at $7508.03 for 1868, and $8551.63 for 1869.

Rec. p. 12; Schedules C and D, p. 20.

They claimed a deduction of ten per cent on the gross sales of each year for commission and guaranty, as before, which was rightly disallowed.

They also claimed that the cost and expense for these years (excluding commission, &c.) amounted to $6730.78 and $10,148.33, respectively. They were allowed as cost and expense $3658.28 for 1868, and $6778.83 for 1869.

The master rejected a charge of $3600 and $4200 for cost and expenses of these years, respectively; of which $3500 was claimed to have been paid to the Boston Fruit Preserving Company, as rent for 1868 of an apparatus at the company's fruit-house in Cambridge, and $100 for sundry small items; and $4000 as rent for the same apparatus, and $200 for other expenses for 1869; and allowed three cents per pound as expenses for these years.

The reasons for the findings are fully stated in the master's report (Rec. pp. 18–20).

It is enough to ask attention to the fact that the appellants claim to have paid $3500, as rent for 1868, for the use of an apparatus substantially the same in size and construction as that for which they charged $100 rent in 1866, and $400 in 1867; or, taking it per pound for fish preserved, the rent was *one cent per pound in* 1866 *and* 1867, and *thirteen cents per pound in* 1868 *and* 1869. Considered as general expenses, the cost for 1866 and 1867 was *three cents per pound*, and for 1868 and 1869 was *seventeen cents per pound.*

The specific objections to the findings of the master are, —

(*a*) The appellants say he has not conformed to the general rule of law regulating the ascertainment of profits in such cases, in that he has not allowed *actual payments* made by the defendants, and costs and expenses incurred by them in prosecuting the business.

As to this, he refused to allow the "actual payments" claimed to have been made because he did not believe, on the evidence, that they had been made; and in this he was fully justified.

He allowed as "costs and expenses" three cents a pound, which was sufficiently favorable to the defendants, and of which they cannot complain.

(*b*) They say he has adopted an arbitrary standard, established by himself, for ascertaining the costs and expenses, instead of conforming to the evidence introduced by the complainant.

But the evidence of payment for rent of this year was not introduced by the complainant. The statements of a defendant on cross-examination as to his account rendered before the master are not to be regarded as testimony introduced by the complainant.

The master did not adopt an "arbitrary standard," but found a fact very favorable to the defendants, by inference from the only testimony in his opinion credible before him, in regard to the amount to be allowed for costs and expenses.

(*c*) They say the basis on which the master estimated the costs for this year is erroneous.

This has been sufficiently answered.

(*d*) They say there was no evidence to warrant the conclusion that the alleged payments of $3600 in 1868 and $4200 in 1869 were not *bona fide* payments, &c., &c.

The complainant submits that there was such evidence, and sufficient evidence, and that the finding is fully warranted.

(*e*) They say that "all the findings of the master relating to the costs and expenses of the years 1868 and 1869 are contrary to the evidence and the weight of evidence submitted to him and reported to the court."

The appellee insists to the contrary as before. It is unnecessary to go into an examination of the evidence in this regard. The point is fully discussed by the master.

(*f*) They say that the master erred in not finding as specifically requested in Schedule K. (Rec. pp. 29, 30.)

Request 2 is to an allegation of fact which has already been sufficiently answered.

Request 3 is, *that they may be allowed the alleged loss*, $1500, *on the business of* 1869, *as a deduction from the general profits received in other years.*

As to this: 1st, It is found as a fact that there was no loss on the business of 1859, but a profit (Rec. p. 21). 2d, The appellee submits that, it being a fact, as found by the master, "that the business of each year stood by itself, was settled before another year's operations began, some months intervening between the close of the operations of one year before the operations of the succeeding year began" (Rec. p. 26), he was right as matter of law in holding that the losses of one year should not be deducted from the profits of other years.

3. PROFITS OF 1870.

There is no question *of figures* as to the profits of this year. If the appellee is entitled to anything for 1870, it is the amount stated by the master, $2371.21.

The appellants make various objections to the master's findings as to this year, all amounting to this: that the master erred in finding as a fact that the appellants used the patented invention in their Charlestown apparatus.

The appellee submits that the finding was justified by the evidence. That the Charlestown apparatus was originally so constructed that its use was an infringement of the patent, and that it was so used for the two seasons of 1866 and 1867; that it was altered between June 20 and December 3 1870, so that its use would not be an infringement, but so that it could readily be restored to its original condition; that the fish preserved in it in 1870 were frozen, and in other respects similar to those frozen and preserved in 1866 and 1867; that the appellants refused to allow an inspection of the only chamber of the apparatus in use when the master visited it for that purpose in 1870; that they made no explanation of the condition of the apparatus in which the fish were frozen and preserved in 1870 (all which are facts proved, Rec. pp. 16, 17, 18), is sufficient justification of the finding. The mere refusal to shew the only chamber in use is enough. *Contra spoliatorem omnia presumuntur.*

The only excuse made for the refusal, that to open the chamber would hurt the fish, is not *sufficient*, for an inspection had been consented to; nor is it *true*, for the chamber was opened to take out fish "once or twice a day, according to need" (Rec. p. 17).

They object also that the master assumed that the burden of proof was upon them to shew there was no infringement in 1870.

This is a mistake. There was no such assumption. The master finds as a fact, that *when in use* the apparatus had no openings; he was satisfied of this on the evidence, notwithstanding that openings had previously been made, and Seavey *said* they were still there, because he refused to allow the master to inspect the only apparatus in use, and he omitted to put upon the stand the men who worked the apparatus at the time. This fact the master states as a "presumption;" that is an inference from the facts he had already stated. He finds it *as a fact*, however, and the court will take it as fact accordingly.

But it is submitted that, it having been decided that this apparatus as used in 1866 and 1867 *did* involve infringement, the burden of proof *was* upon the appellants to shew that when its use was resumed in 1870, with the fish and the freezing mixture in the same chambers, respectively, as before, there *was* a communication between the two chambers which there had not been before.

The motion of appellants for leave to introduce further evidence as to the transactions of this year was rightly denied.

The master was right in deciding that, as matter of law, it was not competent for him to hear further evidence on any of the grounds upon which it was offered after having submitted a draft of his report to counsel.

The grounds of offering it are stated on page 27. As to these, —

1. The appellants' information and belief was on a point of law in regard to the burden of proof, and no ground for re-opening the case.

2. There was evidence tending to shew that the apparatus did not contain the alterations *when in use* in 1870; and the complainant's counsel in his argument insisted upon this point as a fact (Rec. p. 26), and the master so found. The real complaint of the appellants is, that they miscalculated the effect of that evidence.

3. Testimony will not be re-opened upon the statement of a witness that he did not testify as the master says he did testify, or that he intended to testify differently.

Upon the whole case the decree of the Circuit Court should be affirmed.

CAUSTEN BROWNE,
for Appellee.

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Supreme Court of the United States.

JAMES BROWN *et al.*

vs.

ENOCH PIPER.

SUPPLEMENT TO POINT SEVEN OF APPELLANTS' BRIEF.

Racey had two freezers, one was constructed in 1855, or early in 1856, and was used through 1856, 1857, and 1858. Another was constructed in 1859.

Both of these freezers ante-dated the patent of Piper, which was issued March 19, 1861, but by rebutting proof Piper proved his invention back to June, 1858, thus antedating Racey's freezer of 1859.

The proof respecting the use of Racey's first freezer through the years 1856, 1857, and 1858 stands unimpaired.

Racey, during the years 1856, 1857, and 1858, practiced freezing fish in a closed chamber by the use of a freezing mixture cooling that chamber. This he did by placing the fish in the chamber with ice, and having the freezing mixture in a receptacle near the top of the chamber.

Neither this use nor the testimony concerning it was mentioned by the court below, and was, therefore, ignored or entirely forgotten.

The only reply now made to it by appellee's counsel, in his brief, is that that method of Racey in *packing* the fish was the same as Piper says in his patent was old and objectionable.

Piper does not say that that *mode of cooling* or preserving the fish so packed was old and objectionable. He only says that such *packing* was old and objectionable. This practice of Racey was exactly within the Piper patent.

He preserved both fish and ice in a closed chamber by means of a freezing mixture.

He also froze fish in a close chamber by means of a freezing mixture so applied that the freezing mixture was not in communication with the atmosphere of the preserving chamber.

He distinctly says that the top fish were frozen.

The *degree* to which they were frozen is not material to bring the practice within the Piper patent, nor was it necessary for *all* of the fish in the chamber to be frozen to bring the operation within the Piper patent.

One of Piper's modes was to coat his fish with ice and then pack them "closely" in the preserving chamber. So packed they would be in alternate layers of fish and ice, just as Racey said was his practice during the years 1856, 1857, and 1858. The only difference being that Racey applied the ice in layers between the layers of fish as they were packed, instead of applying it as a coating to the fish before they were packed. Being thus packed, each party, both Piper and Racey, applied the freezing mixture to preserve them as they were packed. The effect of the freezing mixture in both cases would be to preserve both fish and ice.

Racey did more to the fish after being packed than did Piper. Racey says he actually froze them by the application of the freezing mixture, after they were packed in the preserving chamber. Piper's patent does not say that he freezes the fish after they are packed in the preserving chamber. By his patent he packed the fish in either of two ~~three~~ conditions:

1st. Frozen and coated with ice.

2d. Without being frozen or coated with ice.

Either of these modes of packing are within the direction of his patent, and all that the patent requires to be done with them after they are packed is to preserve them in a condition suitable for use.

To test the sufficiency or insufficiency of Racey's practice during the years 1856, 1857, or 1858 to defeat the Piper patent, let us consider whether if one now were to pack and preserve fish just as Racey did he would thereby infringe the Piper patent. For that purpose, let us suppose A to be engaged in packing fish in a chamber by alternate layers of ice and fish; then placing in the top of the chamber a metallic receptacle, containing a freezing mixture of ice and salt, the freezing mixture having no contact with the atmosphere of the preserving chamber; then enclosing the chamber at the top, the freezing mixture serving to produce and maintain a cold atmosphere within the chamber containing the fish—just as Racey did. What could A, under the circumstances, say in defence, if sued under the Piper patent?

He would be correctly charged with doing exactly what Piper first defines and then claims to be his invention—the preserving of fish or other articles in a close chamber by means or a freezing mixture, having no contact with the atmosphere of the preserving chamber. If A should say that he packs the fish in an *unfrozen state*, the answer would be, so does the Piper patent, for it expressly ignores the preliminary freezing.

If he were to say that his fish are *packed* in *ice*, the answer would be, so are Piper's, that being one of his ways of packing.

If he were to say that he did not freeze *all* of the fish contained in the chamber, the answer would be, that is immaterial, because according to the Piper patent, freezing is not a necessity.

If he were to say that his only object was to keep the fish *sufficiently cool* to prevent their spoiling, the answer would be, that such was Piper's object.

There would, therefore, be no way by which A could escape the charge of infringement.

Whatever would be an *infringement* of a patent, is sufficient to invalidate the patent if known and used prior to the patentee's invention.